STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2014
v	No. 316299 Saginaw Circuit Court
WILLIAM ROBERT BORRERO, Defendant-Appellant.	LC No. 11-035752-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of one count of second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, one count of carrying a weapon with unlawful intent, MCL 750.226, one count of witness interference, MCL 750.122, one count of receiving and concealing a stolen firearm, MCL 750.535b(2), one count of unlawful delivery of marijuana, MCL 333.7401(2)(d)(3), and seven counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a habitual third offender, MCL 767.11, to serve 780 to 960 months in prison for second-degree murder, 560 to 720 months for assault with intent to murder, 48 to 120 months for felon in possession of a firearm and being armed with unlawful intent, 48 to 120 months for receiving and concealing and for witness interference, and 36 to 96 months for unlawful delivery of marijuana, with all sentences to run concurrently and with credit for 110 days served. He was also sentenced to serve 730 days in prison for felony-firearm, with credit for 730 days served. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

I. BACKGROUND FACTS

On December 31, 2010, Tyler Strong, drove himself, Antoine Green and Aaron Anthony to defendant's residence on North Oakley street in the City of Saginaw to purchase marijuana. Strong stayed in the car while Green and Anthony made contact with defendant in his house. According to Green and Anthony, they paid defendant $100 for an ounce of marijuana before leaving the house without incident. Strong was driving the three of them away from defendant's residence when shots were fired at their vehicle. Green and Anthony testified that a bullet struck Strong in the back of the head. Strong's vehicle then crashed into another vehicle that was parked in a driveway on defendant's street. Green and Anthony then fled the scene. Anthony

testified that he saw a man standing in defendant's front yard firing a gun in his direction. A bystander also reported seeing a man, who fit defendant's description, firing a gun from defendant's front yard. Strong was pulled from the vehicle by law enforcement officers when they arrived at the scene, but died later that evening.

Codefendant Chris Deleon had been at defendant's house on the night of the shooting, along with defendant and his girlfriend, Tierra Kutsch. Kutsch testified that she did not see Deleon again after she heard the gunshots.

Prior to trial, defendant filed a motion for severance pursuant to MCR 6.125(C), arguing, in part, that the shooter was not defendant but rather his codefendant Deleon. Based on this assertion, defendant argued that the case presented one of an "antagonistic defense one one [sic] this is so inconsistent that…there has to be a separate trial." Defense counsel also argued that having to sit next to his codefendant, Deleon would adversely affect defendant's decision to testify. Relying on *People v Hanna*, 447 Mich 35; 524 NW2d 682 (1994), the trial court denied the motion for severance. Defendant filed a second motion for severance in which the trial court denied without a written order.

II. SEVERANCE

On appeal, defendant first asserts that the trial court erred by failing to sever the two trials. Defendant alleges that the joint trial compromised the defense by impeding defendant's right to testify in his own defense.

We review a trial court's decision to grant or deny a motion for severance for an abuse of discretion. *People v Hana*, 447 Mich at 331, 346. "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In his first motion for severance, defense counsel described his client as a "loyal witness in this case" and indicated that "he's probably not going to testify." This, defendant argued, was relevant because his defense strategy would be to argue that codefendant Deleon was the shooter. The circuit court denied defendant's motion because defendant had not "provided the Court with any concrete facts that would justify severance in order to prevent prejudice to either himself or [codefendant] Deleon." The court found further that "[t]here is also nothing of record to indicate the existence of mutually exclusive defenses in this case," and noted that neither defendant nor his codefendant had implicated the other when questioned by the police. Rather, they had merely denied their own involvement in the offenses. In addition, the trial court found that separate trials would be "duplicative, unduly expensive, time consuming, inconvenient for witnesses," and would needlessly divert the court's resources due to the substantial overlap in proofs and witnesses for defendant and codefendant.

Defendant filed another motion for severance based on evidence that "defendant was on tether at his residence at the time of the shooting and was arrested in his home with no recorded violation of his tether," while "co-defendant fled the scene with the murder weapon while released on bond, and that the weapon was subsequently sold in Bay City by the co-defendant's father." At the hearing on his motion, defendant also argued that because he and codefendant

were charged with different offenses, a joint trial created a "risk of confusion" for the jury, as well as created issues of "additional culpability" for both. The court denied defendant's motion without written explanation.

Citing to *Hana*, 447 Mich 325, defendant argues on appeal that despite the fact that his codefendant was not charged with murder, their defenses were mutually exclusive, and that the court's decision to deny severance compromised his defense by affecting his decision whether to testify in his own defense.

MCR 6.120(B)(1) provides that joinder is appropriate where offenses are related. Under the rule, offenses are related if they are based on "(a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1). In cases involving multiple defendants where the offenses are related, "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). Additionally, a trial court has discretion to grant a defendant's motion to sever trials if it finds that "severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants." MCR 6.121(D). "Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial." *Id*.

Defendant argues that his substantial rights were prejudiced by the joint trial because it impinged upon his decision to testify in his own defense. Defendant asserts that he may have decided to testify if that decision did not involve "point[ing] the finger at the co-defendant." Defendant does not explain why implicating codefendant as the shooter in a joint trial would have been any different than doing so in severed trials. He does not explain what about the situation could have caused him to be reticent about implicating codefendant Deleon. Moreover, defendant only argues that a possibility exists that he would have testified. *Hana*, 447 Mich at 346. "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." Additionally, codefendant Deleon was not charged with murder,[1] and so did not present a defense to this charge.

In *Hana*, our Supreme Court held that "mere finger pointing does not suffice" to establish a right to a separate jury or trial. It is not enough that a co-defendant may testify as a witness because a fair trial does not include the right to exclude relevant and competent evidence. *People v Hana*, 447 Mich at 349. Further, "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' and 'irreconcilable.'" *Id.* Defenses are mutually exclusive within this standard if the jury would have to believe the core of evidence offered by one defendant at the expense of the other defendant's core evidence. *Id*. at 349-350.

[1] Co-defendant Deleon was convicted of being an accessory after the fact to a felony, two counts of felony-firearm, and was acquitted of receiving and concealing a stolen firearm.

Relying on *Hana*, we find that in his pretrial motion, defendant did not meet his burden of persuasion. "A trial court ruling on a pretrial motion must have concrete facts on which to base a ruling." *Id.* at 355. "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id*. at 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id***.** at 346-347. On appeal, defendant presents substantially the same arguments relative to the requisite prejudice necessary to mandate severance. Having rejected these arguments as legally insufficient, defendant is not entitled to relief on this issue.

III. INSUFFICIENT EVIDENCE

Defendant next argues that the evidence presented at trial was not sufficient to prove beyond a reasonable doubt that he was guilty of witness interference pursuant to MCL 750.122. This conviction stems from defendant's post-incident interactions with his girlfriend, Tierra Kutsch. During her second police interview, Kutsch recalled that she was left alone in an interview room, and defendant called her from jail on her cell phone. The phone call was played for the jury, and during the call, defendant told Kutsch not to talk to the police and to tell them she wanted an attorney. Kutsch testified that when the law enforcement officers reentered the interview room, she told them that she wanted to talk to defendant's attorney.

Kutsch also testified that she received another phone call from defendant the week before trial. During that call, Kutsch expressed concern that "if [she had] lied anywhere, anytime, . . . they can get me for perjury" defendant told Kutsch that "all you got to do is just stick to your same story. The story was the truth. All you got to do is stick to your same story, you know?" Defendant also told Kutsch "as long as you got your same story from the prelim, you good," and that "[t]hey can't say you lied."

Kutsch testified that she had also received letters and cards from defendant while he was in jail. Kutsch testified regarding a letter she received the week before trial that defendant had sent to her grandmother's house. Kutsch read part of the letter at trial, in which defendant wrote:

> Look, when I go to trial, I need you to tell the prosecutor that I never went outside that night and you're 100 percent sure and that I was inside the house when the shots went off, okay? . . . I never had no gun on me that whole day and that you would have knew if I had one, but I did not have one. Can you do that for me please? And I'll come home for sure. You gotta get back at me ASAP.

This Court reviews challenges to the sufficiency of evidence in criminal trials de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). This Court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Defendant argues in his brief on appeal that "[t]here was no evidence showing that [he] attempted to prevent Tierra Kutsch from testifying at his trial . . . . [He] never told her to lie while testifying, and in fact, had told her to tell the truth as she had earlier testified." Defendant further argues that when he directed Kutsch to speak with his lawyer before talking with the police, his actions were "proper and not in violation of any law, much less tampering/intimidation of a witness [because] Kutsch's status was not as a witness, but [as] a suspect at the time."

MCL 750.122 provides in pertinent part as follows:

> (3) A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> (4) It is an affirmative defense under subsections (1) and (3), for which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully.
>
> (5) Subsections (1) and (3) do not apply to any of the following:
>
> (a) The lawful conduct of an attorney in the performance of his or her duties, such as advising a client.
>
> (b) The lawful conduct or communications of a person as permitted by statute or other lawful privilege.
>
> (6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.

The trial court instructed the jury that to prove the witness interference charge, the prosecutor had to prove the following elements beyond a reasonable doubt:

> First: That [defendant] committed or attempted to commit a willful act.

> Second: That when [defendant] committed or attempted to commit this act, he intended to impede, interfere with, prevent or obstruct a witness's ability to attend, testify or provide information in or for a present or future official proceeding.
>
> Third: That [defendant] knew or had reason to know that the person subjected to the interference could be a witness at an official proceeding.
>
> And fourth: That the interference was done in connection with a criminal case where the crime was murder and/or assault with intent to murder, which crimes have been previously defined for you.

At trial, the prosecutor played for the jury a recording of a telephone call from defendant to Kutsch that she had received while being questioned by police about this case a day or two after the shooting. After Kutsch told defendant she was at the police station, the following exchange occurred:

> *Defendant.* Don't talk to nobody, all right? You want my lawyer's number? Tell 'em—tell 'em your lawyer is Rod O'Farrell, you could call him, okay? Babe?
>
> *Kutsch.* All right.
>
> *Defendant.* All right? You ain't—you ain't talk to 'em did you?
>
> *Kutsch.* No.
>
> *Defendant.* All right. Don't talk to 'em. Just tell 'em your lawyer is Rod O'Farrell. . . .
>
> * * *
>
> *Defendant.* Rod O'Farrell. Tell 'em just like that; all right?
>
> *Kutsch.* All right.
>
> *Defendant.* You hear me? Do not talk to 'em at all. Don't do anything they say. Just tell 'em call your lawyer, Rod O'Farrell. Matter of fact, I'm going to call Rod right now, okay?

When Kutsch's phone call with defendant ended, the recording continued to tape her conversation with the interviewing detectives when they reentered the room. Kutsch asked the detectives if she could call a lawyer, who she identified as "Rod O'Farrell," as defendant had directed.

Despite defendant's claim that his intent during this conversation was to inform Kutsch that she had a right to speak with counsel, the recording showed that defendant was much more concerned with any information Kutsch might divulge to law enforcement officers about the

offense or about their actions the previous night than he was with her legal rights. Defendant's directive not to "tell 'em anything" and to call his lawyer suggests that he wanted to prevent Kutsch from speaking to the police out of a concern on how any information she gave to the officers could affect his case. She did not ask for defendant's advice or express any concern for her situation. Rather, when defendant was told where she was, he firmly and repeatedly told her not to "talk to nobody." He attempted to orchestrate her subsequent conversation with the police.

Black's Law Dictionary (8th Deluxe Ed) defines a witness as someone "who sees, knows, or vouches for something" or someone who "gives testimony under oath or affirmation." Accordingly, even though Kutsch had not been identified as a trial witness when defendant spoke with her in the police station, she was a potential witness in that she had seen or knew something about the events the night of the shooting.[2] Nothing in the definition of witness precludes a witness from also being a suspect. Moreover, it is axiomatic that even a defendant may testify at trial in spite of his or her status. Thus, defendant's argument that there is a difference between Kutsch as a suspect and Kutsch as a witness is without merit.

Further, Kutsch received another phone call from defendant on February 25, 2013, the week before the trial began, which was also partially played for the jury. During the call, Kutsch expressed concern over the fact that she had to be involved in defendant's case as a witness, and of what could happen to her as a result of her involvement:

> *Defendant.* I know you mad. . . . I know you mad right now because they make me want to go to trial and you didn't want me to go to trial. . . .
>
> *Kutsch.* No, it's not that I didn't want you to go to trial. It's that I don't want you to go to trial and me have to go in there and do all that like I did last time, because that's some bullshit if you ask me.
>
> *Defendant.* No, I know that. I know that. I know that's why you mad.
>
> *Kutsch.* And they could easily charge me with whatever they wanted to for the simple fact someone died, you know? They're not going to let it go. Someone died.
>
> *Defendant.* They can't do that, though, all right? So don't—
>
> * * *
>
> *Kutsch.* Okay. They can. If I lied—if I lied anywhere, anytime, they can do that, because they can get me for perjury.

[2] A res gestae witness is an individual who witnessed "some event in the continuum of the criminal transaction" whose "testimony would aid in developing a full disclosure of the facts at trial." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

Defendant. That's why all you got to do is just stick to your same story. The story was the truth. All you got to do is stick to your same story, you know? That's all you got to do.

The above conversation is somewhat cryptic. Kutsch clearly expresses a concern that she could be subject to a charge of perjury,[3] which suggests a concern that she has not been entirely truthful when testifying. To this, defendant responds that she should "stick to your same story." This seems to indicate that defendant is suggesting that if she just continues to make the same assertions, she will avoid any perjury charge. In this context defendant's statement, "The story was the truth," can be understood not as an assertion on the veracity of Kutsch's prior statements, but rather an expressed strategy that as long as the story is consistent no one can say it is not the truth. Indeed, when Kutsch continued to express concern about a possible perjury charge, defendant added that "as long as you got your same story from the prelim, you good. . . . They can't say you lied."

The prosecutor also asked Kutsch to read a letter previously cited into the record that defendant had written to her from jail that she had also received the week before trial began. That letter shows that defendant was attempting to influence Kutsch's testimony. Defendant did not ask Kutsch to tell the truth when she took the witness stand, but rather gave her specific directions as to what to "tell the prosecutor" about what occurred the night of the shooting. This letter constituted sufficient evidence for the jury to find that defendant violated MCL 750.122. In the context of this letter, the ambiguity of the February 25, 2013 phone call seems to be clear. When viewed in a light most favorable to the prosecution, the totality of the conversations show a defendant attempting to influence a witness to testify in a manner favorable to him. Accordingly, defendant is not entitled to relief on this issue.

IV. STANDARD 4 BRIEF

Defendant also raises several additional issues in a supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. *BRADY* DISCLOSURES

First, defendant argues that he was denied his constitutional rights when the prosecutor failed to disclose exculpatory evidence pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We review this preserved constitutional issue de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). In order to establish a *Brady* violation, a defendant must prove that: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). "Evidence is favorable to the defense when it is exculpatory or impeaching." *Id.*

[3] "Perjury" is defined as "a willfully false statement regarding any matter or thing, if an oath is authorized or required." *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004), citing MCL 750.423 (emphasis omitted).

Further, "[t]o establish materiality, a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.*, quoting *US v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

Here, defendant argues that evidence that codefendant was being investigated for two other shootings was exculpatory evidence favorable to the defense. Defendant argues that the evidence would have been admissible under MRE 404(b) "as evidence in terms of character, lending support to the fact that [codefendant] was the shooter in this particular case." In other words, defendant argues that the information was exculpatory because it could be used to argue that because codefendant was being investigated in another shooting, he was more likely to have committed the shooting in issue here. However, MRE 404(b) expressly prohibits the use of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Thus, because the information—even if disclosed—would not have been admissible, there is no reasonable probability that the outcome of the proceedings would have been different. Thus, defendant has failed to establish the elements of a *Brady* violation.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense trial counsel was ineffective for three reasons. First, defense counsel's statements during his motion in limine demonstrated that counsel had a conflict of interest that hindered his ability to effectively represent defendant. Second, defense counsel was ineffective for failing to impeach Kutsch. Kutsch testified that she was pressured or threatened by the police to make statements. Further, Kutsch's testimony was inconsistent. Defense counsel should have impeached her testimony using prior inconsistent statements because Kutsch's testimony was crucial to the prosecutor's case. Third, defense counsel was ineffective for failing to request a jury instruction for manslaughter. The testimony established that defendant cried after the shooting, which could show lack of intent to kill and that there was no malice.

"Generally, a motion for a new trial or for an evidentiary hearing is a prerequisite to appellate review of a claim of ineffective assistance of counsel." *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). Here, there was no motion for new trial or motion for an evidentiary hearing on grounds that defense counsel was ineffective, so this issue is unpreserved. "However, the absence of a motion for new trial or an evidentiary hearing is not fatal to appellate review where the details relating to the alleged deficiencies of the defendant's trial counsel are sufficiently contained in the record to permit this Court to reach and decide the issue." *Id.*

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and (3) that the resultant proceedings were

fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first argues that defense counsel was ineffective because several comments he made during a motion in limine showed that he had a conflict of interest that hindered his ability to defend defendant effectively. Our review of the record clearly shows that the statements that defendant is complaining about were made in the context of defense counsel's lengthy and passionate arguments in favor of separate trials for defendant and codefendant. None of the comments demonstrate a conflict of interest. Accordingly, we find that defendant has failed to establish a factual predicate for this claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant next argues that defense counsel was ineffective for failing to impeach Kutsch with prior inconsistent statements and with information that the police pressured or threatened her into making statements. Defendant does not specify what Kutsch's prior inconsistent statements were or how they were prejudicial to the defense. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

The record shows that defense counsel questioned Kutsch extensively about the pressure she received when being interviewed by the police. Further, defense counsel also questioned Kutsch about prior statements she made and even mentioned one inconsistency in her statements. Then, during closing argument, defense counsel emphasized that Kutsch had been telling the same story "from day one" about being in the bathroom doing her hair. Thus, on this record defendant has not established the defense counsel failed to impeach Kutsch. But even if defense counsel did not impeach Kutsch, it appears that the questions asked and the areas emphasized were consistent with defense counsel's trial strategy.[4] That a strategy does not succeed does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Finally, defendant argues that defense counsel was ineffective for failing to request a manslaughter jury instruction. "Manslaughter is a necessarily included lesser offense of murder." *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006). If a defendant is charged with murder, "an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*.

However, defense counsel's decision to not request a manslaughter instruction, even if the trial court would have been obligated to give it, is not necessarily an instance of ineffective

[4] Additionally, there is evidence that at least some of Kutsch's earlier statements were damaging to defendant, so it is possible that defense counsel did not want to draw the jury's attention to inconsistencies with her earlier statements.

assistance of counsel. Defendant's theory of defense was that someone else was responsible for the victim's death. In his closing statement, defense counsel argued:

> I want to talk very briefly concerning the charges in this case and the distinctions between first and second-degree murder and also as far as assault with intent to murder and the lesser-included offense that you will hear of assault with intent to do great bodily harm less than murder.
>
> And this is very brief, because what this is, is what I believe the law shows in terms of what the shooter should actually be convicted of in this case. But I want to make clear to you that my position is that [defendant] was not the shooter, and I'll get into that much more extensively.

"The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Moreover, the decision to argue one defense over another is also considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Again, that a strategy does not work does not render its use ineffective assistance of counsel. *Petri*, 279 Mich App at 412. Accordingly, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness.

C. SUPPRESSION OF STATEMENT TO POLICE

Finally, defendant argues that the trial court erred when it only suppressed part of his statement to the police. "[A] trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts," and is thus reviewed de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

Both the Michigan Constitution and the United States Constitution guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *Dickerson v United States*, 530 US 428, 433; 120 S Ct 2326; 147 L Ed 2d 405 (2000); *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Cortez (On Remand)*, 299 Mich App at 714.

1. AMBIGUITY OF *MIRANDA* WAIVER

First, defendant argues that the *Miranda* warning was so misleading that it deprived him of the ability to knowingly and voluntarily waive his rights against self-incrimination. In *Miranda*, the United States Supreme Court held that a suspect

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to

> the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [384 US at 479.[5]]

The language used to inform the defendant of these rights is adequate if it reasonably conveys the essential information. *Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). Consequently, a reviewing court is simply required to determine whether the warnings reasonably convey to a suspect his or her rights as required by *Miranda*. *Id*. See also, *California v Prysock*, 453 US 355, 359; 101 S Ct 2806; 69 L Ed 2d 696 (1981) *(per curiam)* ("This Court has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." (Internal quotation marks omitted)); *Rhode Island v Innis*, 446 US 291, 297; 100 S Ct 1682; 64 L Ed 2d 297 (1980) (safeguards against self-incrimination include '*Miranda* warnings . . . or their equivalent'). In determining whether police officers adequately conveyed the *Miranda* warnings, reviewing courts are not required to examine the words employed "as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda.*'" *Prysock*, 453 US at 361.

Here, it appears that the following language was used to convey defendant's rights:

> But it says before we question you, you must be aware of your rights. *You have the right to remain silent. Anything you—anything you say will be taken down in writing and used against you in court. You have the right to talk to an attorney before we talk to you and have him present during questioning.* Do you recognize maybe things from watching TV and movies and stuff—*if you can't afford an attorney, one will be appointed for you by the court at no cost to you.* If you decide to answer questions without the presence of an attorney, you may stop at any time you wish. You can request an attorney before continue (sic). I've read this statement of my rights shown above. I understand what my rights are. I'm willing to answer questions and make a statement without conferring with an attorney or have an attorney present. No promise or threats have been made to me regarding this statement. That just means Jason and I are in here—you known, [not] beating you up and stuff like that. We're not . . . a couple of guys that are going to come in here and rough you up or anything like that. And it says—I don't want an attorney at this time . . . So basically, we just want to talk about what happened last night and try to help you out, ok? All right? You good with that? All right. So, if you can sign those two spots right there. Okay? At those X's. [Alterations and omissions in original; emphasis added).[6]]

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[5] See also *Cortez (On Remand)*, 299 Mich App at 713.

[6] Before trial, defendant filed a motion to suppress the entirety of the statements he made to the police. An 80-page transcript of a video recording of the statement was apparently provided to defendant and the trial court. However, neither a copy of the video recording nor the accompanying transcript is located in the lower court record, nor does defendant provide a copy on appeal. However, in its written response to defendant's motion to suppress, the prosecution

This *Miranda* warning was sufficient because it unequivocally informed defendant that he had the right to remain silent, that any statements made would be used in court, that he had the right to an attorney, that if he could not afford an attorney one would be provided, and that he could ask for an attorney at any time. *Prysock*, 453 US at 361. Although defendant argues that this warning is ambiguous, he does not point to any language in support of his contention. Also, even though the language in the warning included additional comments by the police, such as the police being there just to talk and help defendant and not being there to "rough" defendant up, the addition of this language does not alter the character of the warning actually given.

In this case, at the outset, police informed defendant of all four of his *Miranda* rights. He was told he could remain silent, that anything he said would be used against him, that he was entitled to an attorney, and that if he could not afford an attorney, one would be provided for him. Accordingly, defendant is not entitled to relief on this issue.

2. INVOCATION OF RIGHT TO ATTORNEY

Defendant also argues that he first invoked his right to an attorney on page 42, not page 67 of the interview transcript. Once an accused invokes his Fifth Amendment rights, the police must discontinue interrogation. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). However, to preclude further questioning, a request for counsel must be unequivocal. *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). If the statement regarding counsel is ambiguous, the police are not required to cease questioning or to clarify whether the accused desires counsel. *Davis*, 512 US at 459; *Granderson*, 212 Mich App at 678.

Here, the following colloquy occurred between defendant and the police during his interview:

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directly quoted the portions of the interview transcript pertaining to the *Miranda* warning, defendant's reference to an attorney on page 42, and defendant's references to an attorney on pages 67-69 and 72. Subsequently, during the suppression hearing, defense counsel represented to the trial court the following:

> The prosecutor's filed a written response, which, for the most part—well, I believe he indicates, conceding that from the point where my client expressed his desire to have an attorney, that nothing could be produced after that point, which he attributes to be on page 72, I believe—I'm sorry, page 67, 2978—line 2978. My position, Judge, is that, actually, he had expressed concern to have a lawyer assist him way back on page 42, when this first came up. *And those sections are referred to in my motion and cited verbatim, at least a portion of them, in the prosecutor's response*. [Emphasis added.]

Because there is no dispute about the actual language quoted by the prosecutor in its written response, we rely on it here.

Defendant. If you guys aren't charging me with anything then can I leave out this office then?

Police. No. Listen to me . . . .

Defendant. And go—go back to my house on tether sir. And—and call a lawyer and come back up here with you on Monday and talk about the—about the rest of this stuff?

Police. No, we—we got to talk about—we got to get this heard.

Defendant. Would that be better because it looks to me like you guys are making me—or you know what I mean, making me incriminate myself or something. That's what . . . .

Police. No, we're—we're . . . .

Defendant. It feels like [what] you guys are doing.

Police. The thing is . . . .

Defendant. Would that—would that be better . . . .

Police. Look . . . .

Defendant. If I did that on Monday?

Defendant's statements are not unambiguous requests for an attorney. In context, defendant's statements clearly indicate that he was asking *if* he could leave, go back to his house, call a lawyer *and* come back on Monday to talk more. The key ambiguities in the statement arise because of defendant's conditional language indicating that "if" he was not being charged he wanted to know whether he could go home, call a lawyer, and come back on Monday. Further, defendant did not ask solely if he could call a lawyer, which, by itself was not an unambiguous invocation of the right to counsel, instead he asked if he could do several things, only one of which was call an attorney. Consequently, because it was not an unambiguous request for counsel, the police did not have to cease all questioning.

3. USE OF SUPPRESSED PORTION OF STATEMENT AT TRIAL

Lastly, defendant argues that the jury was shown up to page 69 of the transcript, whereas the trial court expressly ruled that everything after page 67 was suppressed. If pages 68 and 69 were in fact shown, that would have been a violation of the court's suppression order. Defendant does not direct this court to any law or applicable facts in the record in support of his position. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136

(1990). Nothing on the available record supports defendant's assertion. First, when asked if there were any objections to the video recording of defendant's interview being played for the jury, defense counsel indicated he had no objection. Next, the prosecutor indicated that the video recording was "66 transcribed pages." Thus, it appears that the video recording was only played up to page 66 of the transcript. Accordingly, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello